

## SECOND NOTICE OF COMMENT PERIOD

LSA Document #14-254

## RESTRICTIVE COVENANTS

## PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to [329 IAC 1](#) concerning requests for restrictive covenant modifications and associated cost recovery measures for remediation projects described in [IC 13-23](#), [IC 13-24](#), [IC 13-25-4](#), and [IC 13-25-5](#). IDEM seeks comment on the affected citations listed and any other provisions of Title 329 that may be affected by this rulemaking.

## HISTORY

First Notice of Comment Period: July 16, 2014, Indiana Register (DIN: [20140716-IR-329140254FNA](#)).

CITATIONS AFFECTED: [329 IAC 1](#).

AUTHORITY: [IC 4-22-2](#); [IC 13-14-2-9](#); [IC 13-14-9](#).

## SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

## Basic Purpose and Background

A restrictive covenant (RC), often referred to as an environmental restrictive covenant or ERC, may be used as the remedy or part of the remedy for remediation of contaminated land. An RC, defined in [IC 13-11-2-193.5](#), limits the use of the land or the activities that may be performed on or at the land, or requires the maintenance of any engineering control on the land that is designed to protect human health or the environment. An RC runs with the land, binds successors, is recorded by the recorder of the county in which the land is located, and includes provisions for modifications or termination. An RC can be used in remediation projects that deal with remediation of the following:

- A release from an underground storage tank, as described in [IC 13-23](#);
- A release of petroleum at a petroleum facility, as described in [IC 13-24](#);
- A site that is or was listed on the comprehensive environmental response, compensation and liability information system (CERCLIS), in accordance with Section 116 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9616, as described in [IC 13-25-4](#); or
- A release or threatened release of a hazardous substance or petroleum that is handled voluntarily under the voluntary remediation program (VRP), as described in [IC 13-25-5](#).

Modification of an RC may be needed for a variety of reasons, including a change in site conditions or proposed use, property subdivision, or an advancement in science and technology. Before the Commissioner of IDEM may approve a modification request, IDEM must review the request and reassess the status of the site to ensure the modification will not increase the potential hazards to human health or the environment. [IC 13-14-2-9](#) describes how to request a modification of an RC, when a modification is appropriate, and directs the Environmental Rules Board (ERB) to adopt rules providing for the recovery of administrative and personnel expenses incurred by IDEM in evaluating modifications of RCs. For consistency, IDEM is proposing to use similar cost recovery measures to those used in the related VRP. This includes using actual costs and accounting for IDEM staff hours worked based on a fixed amount per hour. The hourly rate will be based upon and adjusted by the Midwest region urban zone consumer price index (CPI) obtained at <http://www.bls.gov/cpi/>.

[IC 13-14-9-4](#) Identification of Restrictions and Requirements Not Imposed under Federal Law

There are currently no federal laws that cover this same subject matter. Since this is a state specific requirement, every restriction or requirement on persons to whom the draft rule applies is "not imposed under federal law" (NIFL element or elements).

The following information is provided with each NIFL element:

- (1) The environmental circumstance or hazard dictating the imposition of the NIFL element in order to protect human health and the environment in Indiana and examples in which federal law is inadequate to provide this protection for Indiana.
- (2) The estimated fiscal impact and expected benefits of the NIFL element, based on the extent to which the NIFL element exceeds the requirements of federal law.
- (3) The availability for public inspection of all materials relied on by IDEM in the development of the NIFL element including, if applicable, health criteria, analytical methods, treatment technology, economic impact data, environmental assessment data, analyses of methods to effectively implement the proposed rule, and other background data.

RCs are placed on property for a variety of reasons to protect human health and the environment. This rule

will not affect how RCs are placed on property; this rule allows an already established RC to be modified or terminated and allows IDEM to recover costs incurred while reviewing these requests. There is no environmental hazard or circumstance that dictates the imposition of this rule.

There are no federal laws applicable to the subject matter of this rule. The costs associated with requesting a modification or termination are highly individualized and dependent upon numerous factors, such as complexity of the request, availability of data for IDEM review, and the amount of time needed for IDEM to review. However, any costs associated with modifying or terminating the RC could be offset by the potential gains in property use and value.

IDEM relied upon the expertise and experience of its technical staff when developing the rule and estimating the associated fiscal impact. IDEM administers similar cost recovery measures in the VRP and used that program as a template for establishing this rule. The following resources were found to be applicable and were relied on during the development of the draft rule and associated fiscal impact:

Bureau of Labor Statistics, Consumer Price Index available online at: <http://www.bls.gov/cpi/>

Indiana Code, [IC 13-14-2-9](#) available online at: <https://iga.in.gov/>

### **Potential Fiscal Impact**

This rule would impose a fiscal impact, as authorized through [IC 13-14-2-9](#), if a person requests a modification of an RC from IDEM and IDEM then incurs administrative and personnel expenses. IDEM's administrative expenses will be based on actual expenditures, and personnel expenses will be based on hours worked on the project. The hourly rate will be set and adjusted by the Midwest region urban zone CPI obtained at <http://www.bls.gov/cpi/>. Expenses are highly individualized and are dependent upon the specifics of the request. Only services rendered by IDEM are governed by this rule. Beyond the fiscal impact of cost recovery measures, this would not impose any costs not already imposed through the authorizing legislation. Specifically, [IC 13-14-2-9](#) requires the submission of certain materials before the commissioner may authorize the filing of a supplemental recording, such as a written request for the modification, a copy of the proposed modification of the RC, and information indicating why the covenant should be modified. Preparing and providing these materials to IDEM will have an associated cost. This could include consultant fees, environmental sampling fees, or attorney fees; these are not incorporated into cost recovery measures for IDEM nor are there any specific requirements in this rule. Modifying or terminating an RC on a property will likely increase the value of the property and its earning potential by allowing less restrictive use of the property. This potential gain could be used to offset any costs associated with preparing the request and any costs paid to IDEM.

### **Public Participation and Work Group Information**

At this time, no work group is planned for the rulemaking. If you feel that a work group or other informal discussion on the rule is appropriate, please contact Lauren Aguilar, Rules Development Branch, Office of Legal Counsel at (317) 234-8559 or (800) 451-6027 (in Indiana).

### **SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST COMMENT PERIOD**

IDEM requested public comment from July 16, 2014, through August 15, 2014, on alternative ways to achieve the purpose of the rule and suggestions for the development of draft rule language. IDEM received no comments in response to the first notice of public comment period.

### **REQUEST FOR PUBLIC COMMENTS**

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the draft rule. Comments may be submitted in one of the following ways:

- (1) By mail or common carrier to the following address:

LSA Document #14-254 Restrictive Covenants  
Lauren Aguilar  
Rules Development Branch  
Office of Legal Counsel  
Indiana Department of Environmental Management  
Indiana Government Center North  
100 North Senate Avenue  
Indianapolis, IN 46204-2251

- (2) By facsimile to (317) 233-5970. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 233-8903.

- (3) By electronic mail to [laguilar@idem.in.gov](mailto:laguilar@idem.in.gov). To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

- (4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

#### **COMMENT PERIOD DEADLINE**

All comments must be postmarked, faxed, or time stamped not later than September 11, 2015. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Lauren Aguilar, Rules Development Branch, Office of Legal Counsel, (317) 234-8559 or (800) 451-6027 (in Indiana).

#### **DRAFT RULE**

SECTION 1. [329 IAC 1-2](#) IS ADDED TO READ AS FOLLOWS:

#### **Rule 2. Restrictive Covenants**

##### **[329 IAC 1-2-1](#) Applicability**

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-11-2-193.5](#); [IC 13-14-2-9](#); [IC 13-23](#); [IC 13-24](#); [IC 13-25-4](#); [IC 13-25-5](#)

**Sec. 1. This rule applies to the owner of a property:**

**(1) that is subject to a restrictive covenant, as defined in [IC 13-11-2-193.5](#), created in connection with a remediation project conducted under:**

- (A) [IC 13-23](#);**
- (B) [IC 13-24](#);**
- (C) [IC 13-25-4](#); or**
- (D) [IC 13-25-5](#); and**

**(2) for which the owner seeks approval from the department to:**

- (A) modify a restriction or obligation; or**
- (B) terminate a restrictive covenant.**

*(Solid Waste Management Division; [329 IAC 1-2-1](#))*

##### **[329 IAC 1-2-2](#) Definitions**

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-11-2](#); [IC 13-14-2-9](#)

**Sec. 2. (a) In addition to the definitions in [IC 13-11-2](#), the definitions in this section apply throughout this rule.**

**(b) "Applicant" means a person who applies for a modification or termination of a restrictive covenant.**

**(c) "Modification" means any amendment to a restrictive covenant subject to this rule that results in a remaining restriction or obligation to the owner of the property.**

**(c) "Owner" means the owner of real property subject to a restrictive covenant.**

**(d) "Termination" means the expiration of the restrictive covenant and cessation of all terms of the restrictive covenant.**

*(Solid Waste Management Division; [329 IAC 1-2-2](#))*

##### **[329 IAC 1-2-3](#) General provisions**

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-9](#)

**Sec. 3.** An owner may request a modification or termination in accordance with [IC 13-14-2-9](#) if:

(1) there is a change in conditions or advancement in science or technology that would permit a modification; and

(2) the modification of the conditions and restrictions imposed by the restrictive covenant would not increase the potential hazards to human health or the environment.

*(Solid Waste Management Division; [329 IAC 1-2-3](#))*

#### **[329 IAC 1-2-4](#) Modification or termination application**

**Authority:** [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

**Affected:** [IC 13-14-2-9](#)

**Sec. 4. (a)** An application for modification or termination of a restrictive covenant must be submitted to the commissioner on forms provided by the department. To be considered complete, the following information must be included:

(1) A copy of the proposed modification or termination.

(2) An explanation of the change in condition or advancement of science and technology that permits the modification or termination.

(3) Third party contact information based on:

(A) required approvals from the original restrictive covenant; or

(B) approval required by a court action.

(4) A copy of written approval for the requested modification or termination from:

(A) the property owner, if different than the applicant; and

(B) any third party as required by:

(i) the original restrictive covenant; or

(ii) a court action.

**(b)** In accordance with [IC 13-14-2-9\(c\)](#), the commissioner may request additional information to make a determination on the modification or termination request.

*(Solid Waste Management Division; [329 IAC 1-2-4](#))*

#### **[329 IAC 1-2-5](#) Action on an application**

**Authority:** [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

**Affected:** [IC 13-14-2-9](#)

**Sec. 5. (a)** The commissioner shall approve a request for modification or termination of a restrictive covenant if the commissioner determines that the modification or termination meets the requirements of:

(1) [IC 13-14-2-9](#); and

(2) this rule.

**(b)** The commissioner may authorize the filing of a supplemental recording to reflect an approved modification or termination of a restrictive covenant pursuant to [IC 13-14-2-9\(c\)](#). A supplemental recording must comply with section 6 of this rule.

*(Solid Waste Management Division; [329 IAC 1-2-5](#))*

#### **[329 IAC 1-2-6](#) Submittal of supplemental recording**

**Authority:** [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

**Affected:** [IC 13-14-2-9](#)

**Sec. 6. (a)** All restrictive covenant modifications and terminations must be recorded in the same manner and with the same county recorder as the original restrictive covenant.

**(b)** The owner shall provide a copy of the supplemental recording to the department within thirty (30) days of the recordation.

(Solid Waste Management Division; [329 IAC 1-2-6](#))

**[329 IAC 1-2-7](#) Cost recovery**

Authority: [IC 13-14-2-9](#); [IC 13-25-4-1](#); [IC 13-25-4-2](#)

Affected: [IC 13-14-2-6](#); [IC 13-14-2-9](#)

Sec. 7. (a) In accordance with [IC 13-14-2-9](#)(d), the applicant shall reimburse the department for the administrative and personnel expenses incurred by the department in evaluating a proposed modification or termination of a restrictive covenant under this rule.

(b) Administrative expenses must include any expense to the department related to the review of the modification or termination request that would not have otherwise been incurred by the department.

(c) Personnel expenses must include the cost per hour of the time the department employee expends in evaluating the proposed modification or termination request. The hourly rate shall be based upon and adjusted by the Midwest region urban zone consumer price index\*.

(d) The department shall send an invoice to the owner for personnel and administrative costs to the department.

(e) Failure to reimburse the department for expenses incurred by the department in evaluating a proposed modification or termination of a restrictive covenant under this rule may result in:

- (1) denial of the modification or termination; or
- (2) legal action under [IC 13-14-2-6](#).

\*Information regarding the Midwest region urban zone consumer price index may be obtained from <http://www.bls.gov/cpi/>

(Solid Waste Management Division; [329 IAC 1-2-7](#))

**[Notice of Public Hearing](#)**

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